

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36042

RONALD K. CASPER,)	2010 Unpublished Opinion No. 385
)	
Petitioner-Appellant,)	Filed: March 16, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

Order summarily dismissing successive petition for post-conviction relief, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Nicole L. Schafer, Deputy Attorney General, Boise, for respondent.

SCHWARTZMAN, Judge Pro Tem

Ronald K. Casper appeals from the district court's order summarily dismissing his successive petition for post-conviction relief. We affirm.

I.

BACKGROUND

In the underlying criminal case, Ronald K. Casper entered an *Alford*¹ plea of guilty to felony burglary in January 2002. Casper was sentenced to an aggregate ten-year term with the first three years fixed.² In February 2003, Casper filed a *pro se* petition for post-conviction relief alleging ineffective assistance of trial counsel. After counsel was appointed for Casper, he filed an amended petition for post-conviction relief alleging six instances of ineffective assistance of

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

² We note that Casper's sentence satisfaction date is September 6, 2011.

trial counsel. In January 2005, the district court denied summary dismissal, finding there was a genuine issue of material fact as to whether trial counsel knew of Casper's desire to file an appeal. Thereafter, at the hearing on the petition, the parties stipulated that Casper had received ineffective assistance of counsel based on the failure of trial counsel to file an appeal on his behalf. The district court granted post-conviction relief and reinstated Casper's time period in which to file an appeal. In January 2006, Casper filed an appeal and his sentence was affirmed by this Court. *See State v. Casper*, Docket No. 31770 (Ct. App. Jan. 26, 2006) (unpublished).

In October 2007, Casper filed a *pro se* successive petition for post-conviction relief in which he sought to pursue the five remaining claims of ineffective assistance of trial counsel which were unaddressed by the district court in the first action, and also alleged ineffective assistance of appellate counsel from the direct appeal for failing to raise critical issues regarding trial counsel's errors made during and prior to sentencing. The district court granted the state's motion for summary dismissal in part, dismissing the claims of ineffective assistance of trial counsel as being barred by the doctrine of res judicata, but allowed Casper an additional twenty days to support his claim of ineffective assistance of appellate counsel.

Through counsel, Casper filed a response to this order, which the district court treated as a motion to reconsider. In its order denying motion for reconsideration of denial of post-conviction relief, dated December 23, 2008, the district court acknowledged that even though the five remaining claims of ineffective assistance of trial counsel were not previously addressed, it did consider each claim and found a genuine issue of material fact only as to the claim for failure to pursue an appeal. The district court proceeded to explain, for clarification, its reasoning as to why the remaining grounds lacked merit. The district court denied the motion to reconsider by determining that neither trial counsel nor appellate counsel was deficient, and that Casper was not prejudiced by their actions. Casper timely appeals the denial of his petition for post-conviction relief.

II.

SUCCESSIVE PETITION

Idaho Code § 19-4908 prohibits the filing of successive petitions for post-conviction relief except in very limited circumstances. It states:

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in

the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

By operation of this statute, any grounds for relief that were not raised in an earlier petition cannot be raised in a subsequent petition if the grounds were known or should have been known to the petitioner at the time of the earlier petition unless the petitioner shows “sufficient reason” why the claim was not asserted in the earlier case. *Stuart v. State*, 118 Idaho 932, 933-34, 801 P.2d 1283, 1284-85 (1990); *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981); *Hooper v. State*, 127 Idaho 945, 947, 908 P.2d 1252, 1254 (Ct. App. 1995). In *Palmer*, the Idaho Supreme Court explained that where certain allegations were presented in an original petition but then were omitted by Palmer’s court-appointed attorney without Palmer’s knowledge or consent, he would *not be* barred from raising these issues in a successive petition. *Palmer*, 102 Idaho at 595-96, 635 P.2d at 959-60.

Casper asserts that the district court erred by summarily dismissing his claims of ineffective assistance of trial counsel because he raised material fact issues which required an evidentiary hearing. The claims in question here are that Casper’s counsel was ineffective for failing to object to the inclusion of a PSI that was potentially inaccurate, counsel’s failure to file a Rule 35 motion for reduction of sentence, counsel’s failure to investigate the facts of the case and potential defenses, and counsel’s failure to explain the law. These allegations may, in certain circumstances, constitute deficient performance.

The state argues that Casper cannot re-litigate these claims through a successive petition because they were finally adjudicated in his initial post-conviction petition. We disagree. Here, the initial post-conviction petition was not finally adjudicated as there were claims that were not addressed therein. During the hearing on the motion to reconsider, the district court stated:

[P]erhaps it would have been more appropriate for the court to write that all the claims are dismissed except one, and that is this right-to-appeal issue. The petitioner then could have appealed the whole ball of wax. He could have appealed the court’s, this court’s, decision on the dismissal of the other claims of ineffective assistance of counsel.

Casper was within his rights to bring a successive petition because the district court never addressed or ruled on the other issues. The district court erred when it dismissed the case on the grounds of res judicata because there was no final adjudication as to the other claims at that

point. As such, there was no bar to those claims being considered by the district court in a successive petition. *See Palmer*, 102 Idaho 591, 635 P.2d 955.

III.

INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). As with a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than “a short and plain statement of the claim” that would suffice for a complaint under Idaho Rule of Civil Procedure 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary disposition of an application for post-conviction relief, either pursuant to motion of a party or upon the court’s own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under Rule 56. Summary dismissal is permissible only when the applicant’s evidence has raised no genuine issue of material fact which, if resolved in the applicant’s favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 88-89, 741 P.2d 374, 375-76 (Ct. App. 1987).

Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant’s evidence because the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by

admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). In addition, allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law. *Hauschultz v. State*, 144 Idaho 834, 838, 172 P.3d 1109, 1113 (2007); *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). Moreover, because the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary disposition is permissible, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible to resolve the conflict between those inferences. *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008). That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*; *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray*, 121 Idaho at 924-25, 828 P.2d at 1329-30. To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.* at 761, 760 P.2d at 1177. Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

B. Ineffective Assistance of Trial Counsel

Casper asserts that the district court erred by summarily dismissing his claims of ineffective assistance of trial counsel because he raised material fact issues which require an evidentiary hearing. The claims in question here are that Casper's counsel was ineffective for failing to object to the inclusion of information in the PSI that was allegedly inaccurate, counsel's failure to file a Rule 35 motion for reduction of sentence, counsel's failure to investigate the facts of the case and potential defenses, and counsel's failure to explain the law. These allegations may, in certain circumstances, constitute deficient performance. *See Murphy v. State*, 143 Idaho 139, 146, 139 P.3d 741, 748 (Ct. App. 2006). To prevail, however, Casper must establish prejudice through the presentation of evidence showing that if counsel had done any of these things, there is a reasonable probability he would not have pleaded guilty but would have insisted on going to trial or that he would have received a more favorable sentence. When applying the prejudice prong to a case involving the entry of a guilty plea, the petitioner must show that counsel's deficient performance "affected the outcome of the plea process." That is, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); and the subject matter of the mistake constituted "an important part of his decision to plead guilty." *McKeeth v. State*, 140 Idaho 847, 851, 103 P.3d 460, 464 (2004); *Hayes v. State*, 143 Idaho 88, 93, 137 P.3d 475, 480 (Ct. App. 2006). A petitioner's mere self-serving assertion that he would not have pleaded guilty absent the mistake need not be accepted by the trial court sitting as a fact finder. *Id.* We will look at each claim in turn.

Casper claims that trial counsel was ineffective for failing to object to the inclusion of a possibly inaccurate PSI. Specifically, Casper objects to the inclusion of statements made by a victim in an unrelated, dismissed case, and to the inclusion of another felony case which may have been dismissed. We agree with the district court when it stated:

The Court has the authority to consider information regarding prior dismissed charges in its sentencing decisions. *State v. Ott*, 102 Idaho 169, 170, 627 P.2d 798, 799 (1981); I.C.R. 32(b)(2), (e)(1). There was no ineffective assistance for counsel's failure to object to information properly included in the presentence investigation.

Casper argues that while the district court's ruling that it could consider dismissed charges may generally be true, it is not in this case. He proposes that the state's desire to argue the dismissed case was not a term of the plea agreement and that the district court thereby allowed the plea

agreement to be amended to his detriment to include a term he did not agree to when he pled guilty. Casper has failed to provide evidence to prove that the information in the PSI was improperly included or that he was unaware of any terms in the plea agreement. A plea agreement that includes dismissal of a charge does not ordinarily preclude mention of that charge in the PSI or at sentencing. Moreover, during sentencing Casper's counsel addressed at length any discrepancies in the presentence investigation, as well as Casper's version of the facts and understanding of the *Alford* plea. As part of his allocution Casper stated, "I believe exactly what has been told here today."

Casper next asserts that trial counsel was ineffective for failing to file a Rule 35 motion for reduction of sentence. He claims that if the court had been made aware of the dismissal of two felony charges in Nevada, a change in the "equity skimming law," and evidence he had to refute the account of a victim in an unrelated, dismissed case, that the court would have reduced his sentence. However, the district court specifically determined that Casper had failed to show any prejudice as a result of his attorney's failure to file a Rule 35 motion, because it would not have reduced his sentence in any case. Where a court finds that a Rule 35 motion would not have resulted in a sentence reduction, no prejudice has occurred. *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999). If it is plain from the judge's expressed reasoning that the result would not change upon exercising his discretion anew, then the decision will be upheld to avoid a fruitless remand. *Id.* at 685, 978 P.2d at 245.

Casper lastly argues that trial counsel was ineffective for failing to investigate the facts of the case and potential defenses, for not explaining the law concerning I.C.R. 11 plea agreements, and for failing to make him aware of Idaho law. He also asserts that counsel never explained to him the intent requirement of burglary or how a misdemeanor theft charge became burglary, and that his plea was coerced by his trial counsel and was not voluntarily made.

What Casper maintains to be extensive evidence in support of these claims is little more than bare conclusory assertions of deficient performance unsupported by the record. As to the claim that the attorney failed to investigate by getting a copy of the store video or interviewing witnesses, Casper's claim is unsupported by any admissible evidence to show either that the attorney did not in fact conduct such investigation nor what evidence such investigation would have yielded. He has not placed in evidence the videotape itself nor an affidavit from anyone who has viewed the videotape to establish that it would have actually aided Casper's defense, nor

has he placed in evidence affidavits or depositions of any other witnesses that he contends his attorney should have interviewed to show that they could have provided evidence helpful to the defense. Absent such evidence, he has not shown prejudice. Casper's own unsubstantiated contentions about what the witnesses would have shown is inadmissible hearsay. I.R.E. 801, 802. As to his claim that his lawyer was ineffective for failing to explain the law concerning I.C.R. 11 plea agreements, he has not identified any component of the law that the lawyer allegedly failed to explain to him nor why he needed to know it nor how it would have affected his guilty plea.

Finally, Casper contends that his counsel provided ineffective assistance by failing to advise him of the intent element of burglary or how charges were enhanced from a misdemeanor to burglary. It should first be noted that this specific claim was not made in the initial petition or in the amended petition, both verified, as Casper only claimed that his attorney failed to make him aware of relevant Idaho law. As the district court recently noted, this issue was not addressed in Casper's memorandum in opposition to summary dismissal of that amended petition. Thus, while Casper did mention lack of knowledge of the law relative to Rule 11 agreements, addressed above, this specific claim was not raised in the initial proceedings. Therefore, to that extent the specific claim now advanced is an improper successive petition.

Casper raised the allegation of ineffective assistance for failure to explain all elements of the crimes and that he had not been advised as to how the charge was enhanced to burglary in the successive petition, which is unverified. He also reiterated these allegations in his brief filed January 28, 2008, which is also unverified. Attached to his memorandum in opposition to summary dismissal is an affidavit with numerous attachments, ostensibly signed in May of 2006, during the initial appellate process. The affidavit provided no evidence regarding the specific claim relative to the failure to explain the intent element or how the charge became burglary. Significantly, Casper provided no evidence in substantiation of the claim or that, because of the alleged failure, he would not have pled guilty and would have insisted on going to trial. In its memorandum in support of summary dismissal, the state noted that Casper had submitted no evidence that he entered his plea not understanding the elements of the crime and that he had failed to present evidence necessary to carry his burden of proof in order to obtain an evidentiary hearing. The district court, in its December 2008 order, stated the Casper had failed to provide evidence or argument to support the allegations.

As we have noted, the district court was “not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law.” *Roman*, 125 Idaho at 647, 873 P.2d at 901. The district court stated that: “the Court finds that the Petitioner has not met his burden of showing a reasonable probability that, but for the attorney’s deficient performance, the outcome would have been different.” We too hold that Casper has failed to raise a genuine issue of material fact which would warrant an evidentiary hearing. The district court correctly granted summary dismissal of this claim.

C. Ineffective Assistance of Appellate Counsel

Casper asserts that the district court erred by summarily dismissing his claim of ineffective assistance of appellate counsel because counsel failed to raise critical issues regarding trial counsel’s errors made during and prior to sentencing. Claims of ineffective assistance of appellate counsel are subject to the standards set forth in *Strickland*, 466 U.S. at 687-88; *Mintun v. State*, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007). The district court determined that Casper failed to show his attorney’s representation fell below an objective standard of reasonableness as it found a genuine issue of material fact existed only with respect to the failure of trial counsel to file an appeal. It further stated, “A review of that order and the file would have indicated to Counsel that the remaining arguments were unlikely to succeed on appeal.”

We agree with the dismissal of this claim. Casper essentially argues that his appellate counsel was ineffective for failing to raise the other issues for which relief was not ruled upon in the original post-conviction petition. However, these issues could not be appealed because there was never any final appealable decision by the district court. In addition, these same sentencing/Rule 35 issues have now been ruled upon by the district court and are the very subject matter of this appeal. As such, the district court did not err when it summarily dismissed Casper’s claims of ineffective assistance of appellate counsel on his previous appeal.

IV.

CONCLUSION

The district court erred when it dismissed Casper’s claims of ineffective assistance of trial counsel on the grounds of res judicata. However, the district court did not err when it summarily dismissed Casper’s claims of ineffective assistance of trial and appellate counsel. Accordingly, we affirm the dismissal of Casper’s successive petition for post-conviction relief.

Chief Judge LANSING and Judge GRATTON **CONCUR.**

Judge Pro Tem SCHWARTZMAN, **ALSO SPECIALLY CONCURRING**

I write separately to note that on August 13, 2004, the district court ordered a written transcript of Casper's guilty plea in the underlying criminal case, and that Casper himself moved for production of the same on January 28, 2008. A copy of that guilty plea transcript, along with Casper's signed Guilty Plea Form, was actually augmented into the record in his prior appeal, Docket No. 31770.

Suffice it to say that production of those documents in this case would offer Casper cold comfort indeed, as they completely undermine and disprove his conclusory assertions concerning his knowledge of the elements of the charge, the Rule 11 plea agreement, the nature of the state's case, the waiver of defenses, and the voluntariness of his plea.